A

NAS CHARTER AVIATION

v.

MUHAMMADIYAH TRAVEL & TOURS SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: 22NCVC-93-02-2014]
20 OCTOBER 2014

C ***CONTRACT:*** *Agreement - Settlement agreement - Parties entered into charter agreement - Defendant defaulted in payment - Parties entered into negotiations and about to execute settlement agreement when defendant failed to execute - Acknowledgement of monies owed and request for new payment schedule via letter by defendant - First cheque for payment issued* D *but dishonoured - Whether there was settlement agreement - Whether contract entered by conduct of parties - Whether defence that cheque was issued to maintain good relations probable*

CIVIL PROCEDURE: *Summary judgment - Contract - Settlement* E *agreement - Parties entered into charter agreement - Default in payment - Whether defendant had defence to plaintiff's claim or part of plaintiff's claim - Whether summary judgment should be granted - Rules of Court 2012, O. 14*

EVIDENCE: *Without prejudice communications - Admissibility -* F *Correspondence between parties via letter to settle outstanding amount - Whether correspondence subjected to 'without prejudice' rule - Whether 'without prejudice' rule absolute rule - Evidence Act 1950, s. 23*

The plaintiff had executed a charter agreement with the defendant G where the former agreed to the charter of its aircraft by the latter according to terms and conditions. Having admitted in a letter to owing the sum of RM11,757,810.61 and promising to pay the debt in seven instalments, the defendant defaulted in the payment and later issued a new payment schedule which was rejected by H the plaintiff. The parties then negotiated and were about to execute a settlement agreement when the defendant's directors failed to execute the same. *Via* a letter written to the plaintiff, the defendant acknowledged owing the plaintiff monies in the amount of RM12,230,310.61 ('the outstanding amount') and again, I requested to make payments according to a new schedule. The first cheque received by the plaintiff in the amount of RM650,000

('the cheque') was dishonoured upon presentation, with a remark bearing 'account closed'. This prompted the plaintiff to give notice of the dishonour of cheque and to demand full payment of the outstanding amount from the defendant. By virtue of O. 14 of the Rules of Court 2012 ('ROC'), the plaintiff sought summary judgment in relation to its claim for the outstanding amount. In objecting the application for summary judgment, the defendant argued that (i) there was no settlement agreement; and (ii) the correspondence between the parties was intended to be confidential and without prejudice.

Held (allowing application):

(1) The court may give summary judgment in a plain and obvious case where the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. (para 10)

(2) Even though the settlement agreement was not signed by the defendant, a contract by conduct had come into existence. Evinced by the undisputed communications between the parties, the defendant's assertion that no settlement agreement by conduct was concluded was wholly unconvincing. If indeed there was no agreement, it was odd that the defendant issued the cheque on the basis of the agreed schedule. Furthermore, the cheque was attached to a covering letter stating that it was issued as first payment as per scheduled for the plaintiff. The defendant's explanation that the cheque was issued to maintain good relations with the plaintiff could not be accepted as it was inconsistent with the facts mentioned in the covering letter. (paras 15 & 17)

(3) The correspondence was clearly not subjected to the 'without prejudice' rule. The 'without prejudice rule' is not an absolute rule and there are exceptions to its application. Where a proposal to settle a dispute is made in a 'without prejudice' letter and that proposal is accepted orally, in writing or by conduct, that letter can be referred to so as to establish that a contract was made and what the terms of the contract were. The correspondence in this case was not expressed to be 'without prejudice'. (paras 26, 27 & 28)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Chen Heng Ping @ Tian Seow Hock & Ors v. Intradagang Merchant Bankers (M) Berhad [1995] 3 CLJ 690 CA ***(refd)***

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC ***(refd)***

Microsoft Corporation v. Electro-Wide Limited [1997] FSR 580 ***(refd)***

Muller v. Linsley and Mortimer [1996] PNLR 74 ***(refd)***

Tomlin v. Standard Telephones and Cables Ltd [1969] 3 All ER 201 ***(refd)***

Unilever v. Procter & Gamble Company [2001] 1 All ER 783 ***(refd)***

United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 FC ***(refd)***

Walker v. Wilsher [1889] 23 QBD 335, 54 JP 213, 58 LJQB 501 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 23

Rules of Court 2012, O. 14

For the plaintiff - Joanne Leong Pooi Yaen; M/s YH Teh & Quek

For the defendant - Mohd Amran Mohd Aminudin; M/s Hanif Idris & Assocs

Reported by Najib Tamby

JUDGMENT

SM Komathy Suppiah JC:

[1] By notice of application dated 21 March 2014, the plaintiff seeks summary judgment under O. 14 of the Rules of Court 2012. ("ROC") in relation to its claim in these proceedings. It claims summary judgment for RM12,320,310.61 plus interest, being monies allegedly due under a settlement agreement reached between the parties.

Background Facts

[2] For the purposes of this application, the background facts are as follows. The plaintiff, Nas Charter Aviation is a company incorporated in the Kingdom of Saudi Arabia. The plaintiff and the defendant, Muhammadiyah Travel and Tours Sdn Bhd, executed an Umrah 1433H Charter Agreement dated 9 December 2012

wherein the plaintiff agreed to the charter of its aircraft for the use by the defendant according to the terms and conditions of the agreement.

[3] By a letter dated 6 August 2013 ("exh. NCA-2") the defendant wrote to the plaintiff admitting owing the sum of RM11,757,810,61 and promised to pay the debt in seven instalments. Despite the promise, the defendant made no payments.

[4] By letter dated 10 October 2013 ("exh. NCA-3"), the defendant issued a new payment schedule which was, however, rejected by the plaintiff.

[5] The parties then entered into negotiations regarding the amount due to the plaintiff and a settlement was reached. The plaintiff then instructed its solicitors to prepare a settlement agreement for the defendant's execution. However, the defendant's directors failed to be present at the plaintiff's solicitor's office to execute the settlement agreement ("exh. NCA-4").

[6] By letter dated 18 November 2013 ("exh. NCA-5"), the defendant again acknowledged owing the plaintiff monies. It was admitted that the sum owing as at the date of the letter was RM12,230,310.61 and requested to make the payments according to the payment schedule attached thereto. The material portions of the letter read:

> SCHEDULE PAYMENT
>
> With reference to the above and in relation to our letter ref. No. MTT-HQ/0461.13/NAC/mya dated 10th October 2013 (refer attached), we wish to highlight that we will try our best to fulfil the payment as **per the schedule submitted**.
>
> As we keep on mentioning earlier, we have incurred losses on this business venture, we do hope your understanding as we are actually budgeting from our next year umrah activities. The given schedule is based on our attainable budget and achievable target. Further we would prefer to deal directly with you and are not willing to pay for the legal fees as well as all other related fees which were imposed and charges to us.
>
> *As we believe that it is our obligation to settle the outstanding of RM12,320,310.61, we will do so within the stipulated in the attached letter by issuing post dated cheque and would appreciate if you could advise to whom, we should write all the cheques.*
> (emphasis added)

[7] On 29 November 2013, the plaintiff through its solicitors, Messrs YH Teh & Quek received a Bank Islam cheque dated 31 December 2013 for a sum of RM650,000 made payable to Messrs YH Teh & Quek. This was the first payment in accordance with the letter dated 18 November 2013. However, the cheque was dishonoured upon presentation on 13 January 2013 with the remarks "account closed". By letter dated 16 January 2014, the plaintiff's solicitors gave notice of dishonour of the cheque and demanded full payment of the outstanding sum.

[8] The plaintiff instituted this action against the defendant on 28 February 2014. This was followed by the present application for summary judgment. Encik Abdul Nasser bin Abu Kassim, a director in the plaintiff affirmed an affidavit on 15 August 2014 in support of the application. The defendant responded by filing an affidavit in reply.

Defendant's Opposition To Summary Judgment

[9] The defendant resisted the application for summary judgment on two principal grounds:

(i) There was no settlement agreement; and

(ii) The correspondence was intended to be confidential and without prejudice.

I will deal with each of those issues below.

Principles Governing O. 14 Application

[10] The principles to be applied in determining whether or not to give summary judgment under O. 14 ROC are not controversial. The court may give summary judgment in a plain and obvious case where the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. See *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400, *Chen Heng Ping @ Tian Seow Hock & 5 Ors v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 690; [1995] 2 MLJ 363, *United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358; [1983] 1 MLJ 206, and *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457; [2000] 2 MLJ 417.

[11] It is also a settled principle that in an application for summary judgment, the defendant will not be given leave to defend based on mere assertions alone. In *Bank Negara* (*supra*), the Supreme Court observed:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable ...

[12] The standard to be applied was eloquently articulated by Laddie J in *Microsoft Corporation v. Electro-Wide Limited* [1997] FSR 580, where he said at pp. 593 to 594 that:

> It is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. The court must look at the complete account of events put forward by both the plaintiff and the defendants and ... look at the whole situation. The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief.

[13] With the above principles in mind, I turn now to consider the defendant's position.

Issue 1: There Was No Settlement Agreement

[14] On the first issue, the defendant contended that there was a triable issue on whether a settlement agreement was concluded between the parties as no signed agreement is exhibited to any of the affidavits filed by the plaintiff. In the absence of a signed agreement, the plaintiff's claim that there is an agreement is misconceived. It was further argued that a close examination of the correspondence between the parties clearly showed that a settlement agreement was not concluded.

[15] The plaintiff accepts that the settlement agreement was not signed by the defendant. However, it is the plaintiff's case that a contract by conduct had come into existence. Looking at the undisputed communications between both the parties, the defendant's assertion that no settlement agreement by conduct was concluded is wholly unconvincing. If indeed there was no agreement, it was odd that the defendant issued the cheque for RM650,000 on the basis of the agreed schedule. In this regard, it is critical to note that the cheque was attached to a covering letter which stated that, "This cheque issued to YH The & Quek as first payment as per scheduled for NAS Charter Aviation".

[16] The defendant's explanation for the issuance of the cheque is important and is found in para. 12 of the affidavit in reply to this effect:

> Cek tersebut telah dikeluarkan oleh Defendan atas dasar tanpa pra-sangka bagi menjaga hubungan baik perniagaan di antara Defendan dan Plaintif dan sebagai menyelesaikan perkara ini tanpa melibatkan tindakan guaman di Mahkamah;
>
> Memandangkan bahawa plaintif tidak memaklumkan bahawa plaintif bersetuju terhadap cadangan jadual pembayaran tersebut dan menunaikan cek tersebut dalam tempoh masa seminggu, defendan telah bertindak menutup akaun bank tersebut kerana beranggapan bahawa plaintif tidak bersetuju terhadap cadangan pembayaran yang dikemukakan oleh defendan tersebut.

[17] The defendant's explanation that the cheque was issued to maintain good relations with the plaintiff is hard to accept and I do not accept. It is inconsistent with the facts mentioned in the covering letter. In these circumstances, in my view, there is no basis for the purported defence that there was no settlement agreement by conduct had been concluded.

Issue 2: The Correspondence Was Intended To Be Without Prejudice

[18] The next defence was based on the 'without prejudice' rule. Apropos this point, the defendant contended that there was a triable issue regarding the admissibility of the correspondence, discussions and emails exhibited to the plaintiff's affidavits. These constituted privileged communications and were inadmissible as they are protected by the 'without prejudice' rule. The arguments advanced in support of this point may conveniently be taken from the defendant's written submission and are as follows:

5.3.3

More pertinently; even if there were such alleged communications between the plaintiff and the defendant regarding an alleged debt they are genuine negotiations with the object of settlement and were made without prejudice in order to preserve the good business relationship between the defendant and plaintiff and as such are protected from disclosure.

5.4

Further, the defendant humbly submits that the alleged communications in which the plaintiff claims the defendant acknowledges and agrees to a debt are privileged communication and are protected from disclosure even though a "without prejudice" label was not expressly employed. It is trite that the law has long excluded from evidence, admissions by words or conduct made by parties in the course of negotiations to settle. The purpose is to enable parties engaged in an attempt to compromise, to communicate with one another freely and without the embarrassment which the liability of their communications, to be put in evidence subsequently, might impose upon them.

5.5

It is clear that from the surrounding circumstances that those relevant communications were clearly intended to be on a without prejudice basis as the parties were in the course of negotiations to settle and therefore are inadmissible as evidence.

[19] To sustain this argument, the defendant referred to a passage in the judgment of Abdul Malik Ishak J (as he then was) in *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749; [1999] 5 MLJ 449. His Lordship observed at p. 756 (CLJ); p. 455 (MLJ):

Negotiations to settle disputes may be conducted in many ways: by oral means (face to face), by correspondences, by facsimile communications, by exchanges of telex messages, by courier services or the combination of any one of them. In *Rush & Tompkins Ltd v. Greater London Council & Anor* [1989] AC 1280, the House of Lords ruled that genuine negotiations with the sole object of settlement are protected from disclosure whether or not the 'without prejudice' label has been expressly employed in the negotiations. As I said, exhs A15, A16 and A17 of encl. 4 do not carry the 'without prejudice' labels, yet the shield of privilege would apply to them. Lord Griffiths in *Rush & Tompkins Ltd v. Greater London Council*, aptly put it as follows (see pp. 1299-1300 of the report):

> The 'without prejudice' rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful, they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice', and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.

[20] The defendant's submission calls for a consideration of the law with respect to the 'without prejudice' rule. An early statement of the rule is that of Lindley LJ in *Walker v. Wilsher* [1889] 23 QBD 335 at p. 337, 54 JP 213, 58 LJQB 501:

> What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.

[21] Section 23 of the Evidence Act 1950 states:

> In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

[22] Section 23 of the Evidence Act is a statutory enactment of the common law rule relating to the admissibility of 'without prejudice' communications. The legislative intent for the exclusion of 'without prejudice' negotiations is on grounds of public policy to encourage settlements. Without this rule, it would be difficult to take any step towards an amicable compromise or settlement as parties would be reluctant to speak freely at a 'without prejudice' meeting if they must constantly monitor every sentence with lawyers.

[23] In *Muller v. Linsley and Mortimer* [1996] PNLR 74 ("Muller") at 77, Hoffmann LJ (as he then was) explained the rule in these words:

> The words in s. 23 contemplate two different situations that invoke the underlying rationales of the "without prejudice" rule. The first situation is where there is an express condition that any admission made by either party in the context of negotiations to settle a dispute is not to be "given", ie, admissible in evidence against the party making the admission. The situation applies to all communications made expressly "without prejudice". The second situation is where an admission is made "under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given". This situation will cover cases where even though a statement is not expressly made "without prejudice" the law holds that it is made without prejudice because it was made in the course of negotiations to settle a dispute: see the judgment of Lord Hoffmann in *Bradford & Bingley plc v. Rashid* [2006] 1 WLR 2066 at [13] ("*Bradford & Bingley*").

[24] In *Tomlin v. Standard Telephones and Cables Ltd* [1969] 3 All ER 201, it was decided that the rule is not absolute and there are exceptions to this rule. Hoffmann LJ noted that resort may be had to the 'without prejudice' correspondence for a variety of reasons. Among such cases is when there is an issue as to whether 'without prejudice' communications have resulted in a concluded compromise agreement.

[25] In *Unilever v. Procter & Gamble Company* [2001] 1 All ER 783, the Court of Appeal was asked to review the rule. Robert Walker LJ who delivered the main judgment emphasised the importance of this rule, but recognised the exceptions to this rule. He listed eight exceptions from the rule. The decision in *Tomlin v. Standard Telephones and Cables Ltd* (*supra*) is the origin for the first exception to the rule. He observed at 796:

> Lord Griffiths in the *Rush & Tompkins* case noted, at 1300C, and more recent cases illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused.

[26] The authorities discussed above illustrate that the 'without prejudice' rule is not an absolute rule. There are exceptions to this rule. Therefore, where a proposal to settle a dispute is made in a 'without prejudice' letter and that proposal is accepted either orally or in writing (or by conduct) that letter can be referred to so as to establish that a contract was made and what the terms of that contract are.

[27] I turn now to the facts of this case. The correspondence in this case is not expressed to be 'without prejudice'. In my view, this gives rise to a rebuttable presumption that it is not 'without prejudice' communication within the meaning of the rule. Can, the correspondence therefore be regarded as negotiating documents?. Without deciding this point, I proceed to address the question of whether (on the assumption that it is 'without prejudice' communication), it is protected by the 'without prejudice' rule.

[28] The defendant in the present case denies a settlement agreement was reached on the correspondence. The plaintiff contends otherwise. In order to determine the dispute between the parties, the principle in *Rush & Tompkins* allows without prejudice correspondence to be looked at in order to see if it gives rise to a settlement agreement and what the terms were. Clearly, the defendant's argument that 'without prejudice' correspondence is inadmissible is untenable. It does not constitute a triable issue. In my view, the correspondence is clearly not subject to the 'without prejudice' rule.

Conclusion

[29] The points made by the defendant in its affidavit has no substance or afford it a defence. Accordingly, I allow the plaintiff's application for summary judgment and costs of RM5,000 to the plaintiff.